No. 06-1243

DEC 26 2006

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In The

SUPREME COURT OF THE UNITED STATES

IN THE INTEREST OF J.M., A Minor Child.

R.W.M., (J.M.'s Father), and L.M., and R.W.M, Sr.,
Petitioners,

v.

V.C. and H.C.
Respondents.

On Petition For Writ Of Certiorari
To The Utah Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether a termination of parental rights action between private parties is required to provide the same statutory safeguards, including the "clear and convincing" standard required by *Santosky v Kramer*, 455 U.S. 745 (1982) and *Lassiter v. Dept. of Social Servcs. Of Durham County, N.C.*, 452 U.S. 18 (1981) as a State action, when parens patriae power is exercised by that State?

2) Whether a State tribunal considering or reviewing a petition to terminate the parental rights of a parent pursued by a private citizen is required to honor the family decisions as recognized in *Planned Parenthood v.* Casey, 505 U.S. 833 (1992) and Lassiter *v. Dept. of Social Servcs. Of Durham County, N.C.*, 452 U.S. 18 (1981)?

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INTRODUCTION

This is an appeal of a parental rights termination action in juvenile court filed on behalf of private parties – the State of Utah is and was not a party; DCFS (the Division of Child & family Services) was not involved. The petitioners in juvenile court are J.M.'s maternal grandparents (who are V.C. and her husband H.C.). The mother in this matter did not participate because she is deceased resulting from suicide. R.W.M., the Father of J.M. and the son-in-law of V.C. and H.C. complains on appeal that one, the juvenile court's findings of unfitness was clearly erroneous because the determination was upon uncorroborated hearsay or rumor; that two, the evidence did not satisfy a "substantial evidence" burden of proof let alone meet a "clear and convincing" burden; and, that three, Rule 55, of the Utah Rules of Appellate Procedure, good intentions aside, violated R.W.M.'s right to due process by not adequately protecting his right to "fundamental fairness." Fundamental fairness is violated when the risk of error is too high because other considerations such as expedience is overemphasized – like here, in termination appeals, Appellants should be allowed to present arguments through points of law in the *Petition on Appeal*, (App. 39) or Rule 24 Briefing.

This is also an appeal by R.W. M. Sr. and L.M., the paternal grandparents of J.M. Prior to the appointment by the Court of custody and guardianship to V.C. and H.C., the Father relinquished custody and guardianship to his own parents, R.W.M. Sr. and L.M. R.W.M. Sr. and L.M. have standing to challenge the court's ruling in light of the lawful conveyance of custody and guardianship by J.M.'s Father after J.M.'s Mother died of a self-inflicted gunshot wound to the head.

A review of the juvenile court and the Utah Court of

Appeals' decision clearly indicates that at no time has either inferior court adequately addressed the clear and convincing burden of proof which was not applied in the trial or appellate decisions. The Petitioners here seek vindication of this clear error *ad hoc*. This Court should enforce the existing standard of proof which has not been reviewed by this Court since 1982 when *Santosky v. Kramer* was decided. *See Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

Moreover, this matter is one of first impression by this Court as it is a private termination action, where the State and its parens patriae authority was not invoked and rights generally afforded when that authority is invoked (i.e., a service plan or reunification services offered) were not provided before termination of parental rights was decided.

Finally, the appellate review under Rule 55 of the Utah Rules of Appellate Procedure was harmfully prejudicial. Civil appeals concerning monetary judgments are scrutinized more carefully. Whereas Rule 55 provides for an abbreviated appellate process which did not include citations to the record or permit access to the record before briefing. Finally, the Rule does not permit any briefing at all. In substitution, the Petition on Appeal used was believed to be instead of a traditional docketing statement and was not considered to be a substitute for a appellate brief.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

The Montgomerys, R.M.W. (J.M's Father) R.W.M. Sr. (J.M.'s temporary guardian and custodian and Paternal Grandfather) and L.M. (J.M.'s temporary guardian and custodian and Maternal Grandmother) (hereinafter "the Montgomerys" or "Father" or "Paternal Grandparents") respectfully petition for a writ of certiorari to review the judgment of the Utah Court of Appeals in this case, after the Utah Court of Appeals refused to rule on the merits of a motion challenging the Constitutionality of Rule 55 of the Utah Rules of Appellate Procedure and the Court's refusal to reverse judgment of the Fifth District Juvenile Court where it terminated J.M's rights to his Father without reunification services and without a finding that termination was clear and convincingly appropriate. The juvenile court took the matter under advisement instead of an immediate decision and in the ruling determined that it was "a very close case" and the court admitted that were the State been involved opportunity to correct behavior would have been provided before a termination was to be considered.

OPINIONS BELOW

The decision of the Utah Court of Appeals affirming the juvenile court termination issued on April 20, 2006 and that court's denial of a petition for rehearing issued on May 25, 2006 and the Court's denial of the motion to declare Rule 55 of the Utah Rules of Appellate Procedure unconstitutional are contained in the Appendix at APP 1-10. The Order of

the Fifth District Juvenile Court is Appendix at APP 11-38. Both Orders of the Utah Supreme Court denying Petitions for Writs of Certiorari are contained in the Appendix at APP 66 and App. 67. The last order of the Supreme Court wherefrom this Petition follows was entered on September 26, 2006.

JURISDICTION

The final decision of the Utah Supreme Court denying the Montgomerys' July 10, 2006 Petition for Writ of Certiorari was entered on September 26, 2006. (APP 67). The jurisdiction of this Court to review this matter is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional provisions are involved in this case:

I. The Due Process clause of the Fifth Amendment, which provides, inter alia:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. The Due Process and the Privileges and Immunities clause of the Fourteenth Amendment, which provides, in Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III. The Reservation of Powers to the People cause of the Tenth Amendment, which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

IV. Utah Code Ann. § 78-3a-404 (1953, as amended) proscribes that any interested party "may" file a petition for termination of parental rights in subpart (1) and that the Attorney General "shall" file for the termination of parental rights in subpart (2).

V. Utah Code Ann. § 78-3a-407 (1953, as amended) proscribed the grounds for termination of a parent's parental rights.

VI. Utah Code Ann. § 78-3a-408 (1953, as amended) proscribed what evidence may be grounds for

termination of a parent's parental rights.

VII. Rule 55 of the Utah Rules of Appellate Procedure provides for an abbreviated appellate process providing a form "Petition on Appeal" rather than a Docketing Statement and Briefing between parties with citations to the record. The Petition on Appeal and Rule 55 do not permit opportunity to receive the record or transcript first before filing.

STATEMENT OF THE CASE

I. Nature of the Case.

In this matter, the juvenile court was asked by the parents of R.W.M.'s deceased wife (V.C. and her husband) to terminate R.W.M.'s parental rights and also to consider their guardianship of J.M., the son of R.W.M. and the deceased wife, N.M. Findings and Order p. 28. (APP 36-37). The juvenile court in its findings had this to say about the decision it faced:

> In addition, apart from the incarceration, the actions of Father are not the type for which parental rights are typically terminated. The Court realizes that this may be hard for the Cottams to swallow in view of what happened to their daughter. But the reality is that even in situations of domestic abuse, in the vast majority of cases the abusing parent is allowed to correct his/her faults and resume their parental role. In short, this is a very close case.

Labeling this matter as **"a very close case"** is admitting a preponderance of evidence characterization or worse, a lesser "substantial evidence" standard. Further not once in the written decision did the juvenile court indicate that it was applying the heightened level standard of proof "clear and convincing." The facts the juvenile court referred to as "a close case" was founded upon four supposed incidents presented as hearsay testimony. The incidents were not corroborated. This Court isolated those incidents as follows:

> In one of these incidents, witnesses described Father as "body slamming" the deceased onto a concrete sidewalk. In another incident, a witness observed Father dragging the deceased back into the home against her will. Another incident involved Father throwing an object at the deceased that led to hospital care. And the final incident resulted in the filing of a police report on the night before the deceased's death.

These incidents of abuse were allegedly domestic violence directed at the mother of J.M. and not abuse allegations against J.M., **typically required to prove parental unfitness**. These alleged acts of domestic violence, V.C. alleged caused the deceased, R.W.M.'s wife, to commit suicide. Findings and Order p. 7. (APP 16-17).

II. Course of the Proceedings:

R.W.M. appealed Judge Higbee's decision to terminating his rights to his son, J.M. A trial was held on six separate days, beginning February 28, 2005 and ending April 15, 2005. The trial was not limited to reviewing just the petition to terminate R.W.M.'s rights, but included best interests information relating to both J.M.'s paternal

grandparent's petition for guardianship, and V.C.'s petition for custody and guardianship. Findings and Order p. 1. (APP 11).

At trial, V.C. and her husband H.C. testified, the paternal grandparents testified, and among others, a police officer testified about a reported incident the night before R.W.M.'s wife took her own life.

III. Disposition in Lower Courts:

As stated above, a six day trial took place, commencing on February 28, 2005 and ending April 15, 2005 occurred. At the conclusion of the trial, the Honorable Thomas M. Higbee took the matter under advisement. On June 23, 2005, the juvenile court issued its decision terminating R.W.M.'s parental rights and awarding V.C. temporary guardianship, "pending the filing of a petition for adoption." Findings and Order p. 29. (APP 37).

In the Court of Appeals, R.W.M. filed a *Petition on Appeal*, (APP 39), pursuant to Rule 55 of the Utah Rules of Appellate Procedure. Unlike other appeals, the *Petition on Appeal* does not provide for an arguments section pursuant to Rule 24(a)(9) of the Utah Rules of Appellate Procedure, limits the number of pages , and requires the filing of the *Petition on Appeal* before the preparation and review of trial transcripts pursuant to Rule 11 of the Utah Rules of Appellate Procedure.

Because Rule 55 of the Utah Rules of Appellate Procedure does not specifically inform the reader that subsequent briefing pursuant to Rule 24 of the Utah Rules of Appellate Procedure is disallowed, the Court of Appeals

issued an opinion on April 20, 2006, without considering R.W.M.'s points of law normally included in an arguments section in briefing. Because Rule 55 is vague an attempt to provide the Court of Appeals with an arguments section or a motion before the ruling declaring Rule 55 unconstitutional for being "fundamental unfairness" was not submitted before the decision. Honestly, it was believed that the *Petition on Appeal* was in lieu of a docketing statement not intended to be in lieu of a Rule 24 Brief of Appellant.

After the Court of Appeals' April 20, 2006 decision was rendered, on May 11, 2006, R.W.M. filed with the Court of Appeals a *Petition for Rehearing* (APP 51-65) and a *Motion to Declare Utah R. App. P. 55 Unconstitutional* (APP 47-49) arguing *Santosky v. Kramer* points of law.

On May 25, 2006, the Court of Appeals denied the *Petition for Rehearing* and R.W.M.'s motion. The motion was denied by the Court of Appeals claiming that R.W.M. filed the motion untimely.

STATEMENT OF FACTS.

On February 8, 2002, J.M., the minor child was born. On September 3, 2003, N.C., R.W.M.'s wife and the mother of J.M. died – the result of a self-inflicted gunshot wound. The couple (R.W.M. and N.M.) had married on July 5, 2003. The court heard testimony concerning alleged incidents of domestic violence between R.W.M. and N.M. prior to her death during the Summer of 2003. The testimony concerning alleged acts of violence were uncorroborated hearsay or

rumor from primarily three sources, V.C. and her husband, and a police officer the night before N.M.'s self-inflicted death.

The juvenile court accepted the hearsay above R.W.M.'s testimony. Findings and Order p. 5. (APP 15). The court claimed the hearsay was uncontroverted. Those allegedly uncontroverted incidents totaled four incidents.

> In one of these incidents, witnesses described Father as "body slamming" the deceased onto a concrete sidewalk. In another incident, a witness observed Father dragging the deceased back into the home against her will. Another incident involved Father throwing an object at the deceased that led to hospital care. And the final incident resulted in the filing of a police report on the night before the deceased's death.

(APP 5). Relying on these four incidents, coupled with the fact that R.W.M. was incarcerated following the death of his wife, the Court terminated R.W.M.'s rights to J.M. The termination was decided despite the fact that while facing the possibility of prison, R.W.M. signed a delegation of parental powers over to the paternal grandparents on October 24, 2003, almost 9 months before he was sentenced to prison, and 10 months before the maternal grandparents filed the action to terminate R.W.M.'s parental rights. At the time of delegation, R.W.M. had full custody and rights with regard to J.M.

Moreover, it cannot be said that R.W.M. did not adequately make arrangements providing for J.M.'s maintenance, care and welfare while away, or that he did not express his concerns over those issues like in *Lassiter v.*

Dept. of Social Servcs. of Durham County, N.C., 452 U.S. 18, 24, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

REASON FOR GRANTING THE PETITION

Certiorari Should Be Granted In This Case Because The Utah Courts Failed to Follow Guiding Supreme Court precedence.

As stated above, this Court's decisions of *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Lassiter v. Dept. of Social Servcs. of Durham County, N.C.*, 452 U.S. 18, 24, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); and *Planned Parenthood v. Casey*, 505 U.S. 833, 851, 112 S. Ct. 2791, 2807, 120 L. Ed. 2d 674 (1992) (plurality opinion) were not followed in the course of terminating the parent-child relationship between J.M. and R.W.M. and in deciding to reject the temporary custody and guardianship conveyance of J.M. by his Father to the Paternal Grandparents – a right and privilege of a parent, or family, concerning the health and welfare of a child. *Lassiter* and *Planned Parenthood* read together recognize the existence of "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education" in the absence of a parent. In this matter is was flagrantly error to deprive the Montgomerys of custody and guardianship of J.M. where there were no allegations directed against the Paternal Grandparents and because no timely challenge was made by V.C. and H.C. to set aside the conveyance of custody and guardianship by J.M.'s parent to his grandparents concerning his own child.

Moreover, the appellate review provided by Rule 55 of the Utah Rules of Appellate Procedure are and were woefully deficient in this matter as the rule provides for an abbreviated appellate review rather an than a careful review. Appeals of a monetary award or more closely guarded than child welfare cases are contrary to the societal demands described in *Santosky*. *Santosky* and *Lassiter* recognized the need for clear and convincing evidence in order to terminate parent rights. This matter is more particularly egregious in that in contrast to the parent's failure realized in *Lassiter*, no such failure occurred in this case. Believe custody might become a problem during his absence, the Father of J.M. conveyed temporary custody and guardianship to his parents, the Paternal Grandparents of J.M.

In *Santosky*, this Court required clear and convincing evidence. The evidence in this matter was obviously not clear and convincing because one, the juvenile court judge took the matter under advisement and later rendered a written decision instead of deciding at the close of trial, and two, in the decision itself, the court recognized one, if this matter involved the State as a party exercising *parens patriae* powers, the Juvenile Court Act and traditional practices would have provided the Father opportunity to correct behavior before termination would have been warranted.

CONCLUSION

The petition for a writ of certiorari should be granted. The Petitioners had every right to delegate custody and guardianship between the Father and Paternal Grandparents

of J.M. without the juvenile court's interference. No allegations were raised concerning the Paternal Grandparents' fitness during R.W.M.'s absence. The termination of R.W.M.'s parental rights while disregarding safeguards and Constitutional presumptions that this Court has previously recognized, including to "clear and convincing" evidence, and by depriving the Father of the same opportunities to correct behavior before considering a termination were fundamentally unfair and the decision should be vacated.

Respectfully submitted,

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APPENDIX

APP 1

IN THE UTAH COURT OF APPEALS

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State of Utah, in the interest of J.M., a person under eighteen years of age.	)	Memorandum Decision (Not for Official Publication)
R.W.M., Appellant.	)	Case no. 20050603-CA FILED (April 20, 2006)
v.	)	2006 UT App 158
V.C. Appellee.	)	

- - - - -

Fifth District Juvenile, St. George Department, 434169
The Honorable Thomas M. Higbee

Attorneys: D. Bruce Oliver, Salt Lake City, for Appellant
Michael R. Shaw, St. George, for Appellee
Martha Pierce and Mandy Rose, Salt Lake City, Guardians Ad Litem

Before Judges Davis, Orme, and Thorne.
PER CURIAM:

R. M. (Father) appeals the termination of his parental rights in J. M. We affirm.

Father claims that the court impermissibly relied upon hearsay statements in determining that Father's parental rights in J. M. Should be terminated.[1] Specifically, the juvenile court

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1. We note that while rule 55 relaxes the normal rules applicable to briefs in order to expedite the appellate

admitted into evidence several statements made by J. M.'s mother (the deceased) to her mother, her father, and a police officer concerning alleged incidents of abuse. The first set of statements relate to the deceased's statement to each of her parents during a hospitalization that required staples to close a wound in the back of her head. While in the hospital she told her parents that the wound was the result of Father throwing a plate at her. In regard to these statements, even if the statements were inadmissible hearsay, their admission was harmless because the evidence was cumulative. Specifically, the deceased's parents testified that Father admitted to throwing an object at the deceased that struck her in the head. While Father denied this event ever took place and denied making this statement to the deceased's parents, the juvenile court found that the deceased's parents were credible while Father's testimony was not credible. See In re E. R., 2001 UT App 66, 1111, 21 P.3d 680 (stating that juvenile court is given wide latitude of discretion based in part on its opportunity to judge the credibility of witnesses); see also State v. Workman, 852 P.2d 981, 984 (Utah 1993) (stating that "[o] rdinarily, a reviewing court may not reassess the credibility or re-weigh the evidence"). Thus, because the statements complained of were merely cumulative any error in admitting the statements would have been harmless. See In re J. C., 808 P.2d 1131,

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1. (....continued)
process, the rule requires an appellant to provide sufficient information and analysis to allow this court to fully understand the issues appealed. Utah R. App. P. 55. An appellant meets this requirement by, among other things, providing specific issues for review and a brief explanation of the authority that the appellant believes demonstrates that the juvenile court erred. General issue statements and citations to case law without an explanation as to why that case law requires reversal does not meet this burden.

1136 (Utah Ct. App. 1991) (concluding that harmless error doctrine applied to appellant's claim that the juvenile court improperly admitted hearsay evidence when other non-hearsay evidence supported the juvenile court's findings and conclusions).

The second set of statements relate to the decedent's statements to her parents the night before she died concerning another domestic abuse incident with Father. The juvenile court determined that the statements were admissible under the excited utterance exception to the hearsay rule. See Utah R. Evid. 803(2). In so concluding, the juvenile court found that a startling event had occurred (an incident of domestic violence), that the decedent was still under the stress caused by the event, and that the statements related to the event. See State v. Mickelson, 848 P.2d 677, 683 (Utah Ct. App. 1992) (discussing three-prong analysis for admissibility of a statement as an excited utterance). Accordingly, the juvenile court correctly applied the law dealing with excited utterances. Further, based upon our review of the record, we cannot say the juvenile court's findings relating to the excited utterance were clear error, nor can we conclude that the juvenile court abused its discretion in admitting the testimony. See State v. Workman, 2005 UT 66, 1110, 122 P.3d 639 (stating that review of admissibility of hearsay evidence requires review of legal determinations under correctness standard, review of factual findings under clear error standard, and review of ruling of admissibility under abuse of discretion standard). Thus, such statements were properly admitted.

The final set of statements deals with statements the deceased mad to a police officer shortly after the statements she made to her mother and father on the night before her death. Without determining whether such statements were inadmissible hearsay, we conclude that even if the statements

should have been excluded, their admission into evidence was harmless error. Specifically, such testimony was merely cumulative of the testimony of the decedent's mother and father who testified to the same information. Accordingly, Father can demonstrate no harm in the admission of the testimony. See In re J. C., 808 P.2d at 1136.[2]

Father next argues that the evidence was insufficient to support the termination of his parental rights.[3] We "review the juvenile court's factual findings based upon the clearly erroneous standard." In re E. R., 2001 UT App 66, ¶11, 21 P.3d 680. "The juvenile court in particular is given 'wide latitude of discretion as to the judgments arrived at' based upon not only the court's opportunity to judge credibility firsthand, but also base on the juvenile court judges' 'special training, experience and interest in this field, and . . . devot [ed] . . . attention to such matters . . . .'" Id. (Citations omitted). So, in reviewing an order terminating parental rights, this court "will not disturb the juvenile court's findings and conclusions unless the evidence clearly preponderates

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2. Our review of the record revealed other hearsay objections to the admission of evidence. However, our review of those statements indicates that the statements were properly admitted or, alternatively, that Father suffered no harm from the admission of the statements.

3. More particularly, Father's second issue on appeal states: "Whether the Court's conclusions were clearly erroneous in light of the clear and convincing evidence requirement." We assume that Father is claiming that, based upon the clear and convincing standard, there was insufficient evidence to support the juvenile court's conclusions of law that led to the termination of his parental rights. This is a sufficiency of the evidence claim.

against the findings as made or the court has abused its discretion." In re R. A. J., 1999 UT App. 329, 16, 991 P.2d 1118.

The juvenile court terminated Father's parental rights after determining that: (1) J. M. was abused and neglected: (2) Father was an unfit parent; (3) J. M. Was in an out of home placement under the supervision of the court and Father had been unable or unwilling to remedy the circumstances that led to the removal; and (4) Father has made only token efforts to eliminate the risk of unfitness and abuse. Under Utah Code section 78-3a-407 (1), the finding of any single ground is sufficient to warrant termination of parental rights. See Utah Code Ann. § 78-3a-407 (1) (Supp. 2005) (providing that the court may terminate all parental rights if it finds any one of the grounds listed); see also In re F. C. III, 2003 UT App 397, 16, 81 P.3d 790 (noting that any single ground is sufficient to terminate parental rights). Thus, if any one of the grounds found by the juvenile court to terminate Father's parental rights is supported by the record, such ground is sufficient to warrant termination of Father's parental rights.

The juvenile court did not abuse its discretion in finding Father to be an unfit parent. At trial, evidence was adduced that Father had abused the deceased on at least four separate occasions. In one of these incidents, witnesses described Father as "body slamming" the deceased onto a concrete sidewalk. In another incident, a witness observed Father dragging the deceased back into the home against her will. Another incident involved Father throwing an object at the deceased that led to hospital care. And the final incident resulted in the filing of a police report on the night before the deceased's death. Additionally, the deceased frequently had bruises following arguments with Father and Father acknowledged to at least one person that he had physically

harmed the deceased and needed to treat her better. Such acts demonstrate a history of violent behavior. Further, at the time of trial Father was incarcerated and was not due to be released form federal prison for forty-six months, thereby making him unavailable to be a parent for nearly four years.[4] Because J.M.'s mother is no longer around to care for him, J. M. Will be deprived of a normal home for a lengthy period of time due to Father's incarceration. See In re D.B., 2002 UT App. 314, 512, 57 P.3d 1102 (stating "even absent the statutory mandate of subsection (e), incarceration would make it unlikely that Father would be able to remedy the circumstances that made him unfit, including his violent behavior. These facts, coupled with Father's criminal history, drug history, and his poor parenting habits, such as continuing to refer to J. M. As a "little bastard," demonstrate that the juvenile court did not err in finding that Father was an unfit parent. Accordingly, the juvenile court did not abuse its discretion in terminating the parental rights of Father.[5]

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4. While a parent whose child is not in DCFS custody may not have his parental rights terminated solely due to incarceration, a lengthy stay in prison that makes it so neither parent is able to perform his parental duties may be a factor in determining whether the incarcerated parent is unfit. See In re D. B., 2002 UT App 314, 5511-12, 57 P.3d 1102 (concluding principle announced in prior case predating subsection 78-3a-408 (2) (e), that incarceration leading to inability of either parent to perform the duties as a parent and unable to give stability to children, could lead to finding of unfitness).

5. Father has not alleged that the juvenile court abused its discretion in determining that it was in the best interest of J. M. For Father's parental rights to be terminated. While such a finding is necessary to terminate Father's parental rights, he makes no mention of best interests in his petition.

Affirmed.

s/ James Z. Davis
James Z. Davis, Judge

s/ Gregory R. Orme
Gregory R. Orme, Judge

s/ William A. Thorne Jr.
William A. Thorne Jr., Judge

Accordingly, we do not address the issue.

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FILE
UTAH APPELLATE COURTS
MAY 25 2006

IN THE UTAH COURT OF APPEALS

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State of Utah, in the interest of J.M., a person under eighteen years of age.	)	ORDER
	)	Case no. 20050603-CA
V.C., Appellee.	)	
v.	)	
R.W.M., Appellant.	)	

- - - - -

Before Judges Davis, Orme, and Thorne.

This matter is before the court on a petition for rehearing filed pursuant to Rule 35 of the Utah Rules of Appellate Procedure.

In his petition for rehearing, appellant asserts that the juvenile court applied an incorrect burden of proof and that the juvenile court impermissibly weighted the child's best interest between R. W. M. and his maternal grandparents. A review of the record reflects that the juvenile court applied the correct burden of proof, and the statement "close call" does not mean it used a preponderance of the evidence standard. Our review of the record also reveals that the juvenile court complied with the law in finding that R. W. M. Was unfit, then examining the best interest of the child prior to terminating R. W. M.'s parental rights.

R. W. M. Also has filed a motion requesting that rule 55 of the Utah Rules of Appellate Procedure be found unconstitutional R. W. M. Did not raise this issue in his petition on appeal. Accordingly, such issue was waived.

It is HEREBY ORDERED that the petition for rehearing is denied.

It is ALSO HEREBY ORDERED that R. W. M.'s motion to find rule of Appellate Procedure unconstitutional is denied.

Dated this 25th of May, 2006.

FOR THE COURT:

s/ William A. Thorne Jr.
William A. Thorne Jr., Judge

State of Utah, in the interest of Jacob Montgomery DOB: 02/08/2002	)	FINDINGS AND ORDER
	)	CASE NO. 434169
A Person Under the Age of 18 years	)	Judge Thomas M. Higbee

This matter came before the Court for trial on six separate days, beginning February 28, 2005 and ending April 15, 2005. The issues tried are set forth in the cross petitions of the parties which will be discussed below. Each of the parties was present at all proceedings (Robert Montgomery, Jr. telephonically and occasionally absent) and each party was represented by their respective counsel of record at all proceedings. At the conclusion of the evidence and argument the Court took the matter under advisement and now, having reviewed the evidence presented, the arguments of the parties, and having independently researched the issucs, the Court enters this order resolving th issues tried.

INTRODUCTION

There are actually three separate petitions before the Court, involving a number of overlapping issues. Chronologically, the first pleading is the Petition for Custody and Guardianship, filed by the Cottams on November 11, 2003. The second pleading is the Verified Petition for Appointment of Guardian, filed by the Montgomerys on June 2, 2004. Finally, the Cottams filed a Verified Petition for Termination of Parental Rights on August 23, 2004 seeking to terminate the parental rights of Robert Montgomery, Jr.

These issues were also preceded by a prior proceeding here

in the Fifth District Juvenile Court, protective order case no. 430152. The issues in that case were resolved by the Court's temporary orders, and then subsequently by the Court's order of dismissal on stipulation of the parties after the filing of the cases now being decided. All issues in the protective order proceedings were previously dissolved by dismissal and the cases at bar are not affected by the previous protective order proceedings.

As noted, there are three different sets of legal issues framed by three different pleadings, all intertwined with common facts. The Court has wrestled some with exactly to format this decision, and after some consideration has settled on the format which follows. The Court will first make its findings of fact, which will include a finding on all facts which the Court determines to be relevant to its legal conclusions and ultimate decisions on all issues in the case. All of the findings of fact which are set forth herein are made by clear and convincing evidence. Following the findings of fact, the Court will separately analyze and make its legal conclusions on each of the material issues framed by the pleadings. Finally, the Court will enter its decree and order based on the findings of fact and conclusions of law.

FINDINGS OF FACT

1. The minor child subject of these proceedings is Jacob Montgomery ("Jacob" or "the child"), born February 8, 2002.

2. Jacob's father is Robert Montgomery, Jr. ("Father"). His mother is Nicole Cottom Montgomery ("Mother" or "Nicole"), who died on September 3, 2003. The Montgomerys are the parents of Father, and the paternal grandparents of Jacob. The Cottams are the parents of Mother, and the maternal grandparents of Jacob.

3. Earlier in the proceedings there were some difficulties in

bringing all of the required parties into the respective cases.

4. Father and Mother began their relationship together for approximately 1 year before Jacob's birth. Jacob was born on February 8, 2002, and the parents were married on July 5, 2003.

5. The relationship between Father and Mother was rocky at times, which will be discussed in more detail below. There were disagreements between the parents, including disagreements regarding financial matters.

6. However, the Court does not find that Father failed to provide funds for food and other necessities for the support of either Mother or Jacob. There was considerable testimony offered by all parties on both sides of this issue. While there were certainly issues between Father and Mother about these things, the proof is insufficient to establish by clear and convincing evidence that Father neglected either Jacob or Mother by not providing necessities.

7. Mother suffered significantly, both physically and emotionally, at the hand of Father. Mother was not without parental fault in this relationship. Because the claimed pattern of domestic violence is an important foundational issue, the Court will make detailed findings in paragraphs 8 through 24 below.

8. Sometime in or prior to the summer of 2003, following a disagreement in the early morning hours, Father physically grabbed Mother and dragged her from the front area of the residence back into the house. This was done forcefully, against her will, and with the child on the premises, although not in his direct presence. It was in the presence of others. There was no testimony offered by Father to controvert the evidence of this incident offered by the Cottams, which was given by Josie Barnum. This action constitutes physical and mental abuse of Mother by Father.

9. In approximately late June of 2003, in the front yard of their residence, Father physically forced Mother to the ground.

Father threw her, or slammed her, to the ground causing physical injury. This was done in the presence of the minor child and others. This action caused Jacob to react distressfully and emotionally.

10. Father claims that this incident occurred differently than indicated by the evidence offered by the Cottams. While he concedes that he put Mother down harder than he should have, he minimizes the incident, claiming that it was not done in a way that "would hurt her." Transcript p. 19, paras. 9-12; pp. 176-180. On this point the Court finds the testimony offered by the Cottams more credible for several reasons.

11. First of all, there is significant independent evidence that Father slammed Mother to the ground. While her loyalty to Mother was obvious, Josie Barnum is an independent witness who essentially has nothing either to gain or lose by this proceeding. Her testimony squarely supports the Court's finding. Similarly, Tacie Montgomery, despite her obvious loyalty to Father, testified that Father basically "body slammed" her to the ground.

12. Next, the reactions of the people involved at the time of the incident are a clear indication that Father slammed Mother to the ground as the Cottams allege. It is uncontroverted that the incident caused significant emotional response from those present. Because of this action alone, Mother was taken to the home of the Cottams. When she arrived she was upset and crying and Jacob was very upset. Had the incident occurred as related by Father, those involved would likely not have been so upset and Mother would not have had to seek relief away form her home.

13. Father has significantly less credibility than the other witnesses who testified on the point.

14. On an unidentified date a few months prior to September 3, 2003, Father threw a plate at Mother that struck her in the head with such force that she had to go to the hospital to have staples put in. Once again, the evidence

offered by Cottams is substantially more credible than that offered by Father, for the reasons set forth in paragraphs 15 through 17 below.

15. On this point the position of Father is not credible and the Court's finding is supported by all other evidence. It is uncontroverted that Mother ended up in the hospital with a gash on her head that required staples. At one point she said Father threw a plate at her and hit her. Father acknowledged to both Howard and Valerie Cottam that he had caused the injury by throwing an object at her, but claimed that he hadn't intended to hit her.

16. At the trial, Father stated that he didn't know what had happened. He says he only knows "what [Nicole] said happened." Transcript p. 35, paras. 12-22. This is not credible. The Court believes the testimony of the Cottams over the testimony of Father. For the reasons set forth below, the Cottams are more credible than Father. In addition, Father's explanation of what happened simply does not ring true. If Father didn't cause the injury, he would not have just let the incident pass as casually as he portrays. Because Father has offered no alternative explanation for Nicole's injury, the only reasonable conclusion is that it occurred as the Cottams have alleged.

17. The fact that Mother did not give consistent stories about the incident could cut either way, and is certainly consistent with the pattern of abuse that the Court finds to have occurred in this marriage.

18. On September 2, 2003, the night before Mother died, Father physically and emotionally assaulted Mother. This too, place at their residence at approximately 10 p.m. At that time Father, in some manner, struck Mother in the head, forced her to the ground, and choked her. While once again Father denies that he did this, there are many facts which lead the Court to this finding, which are set forth in paragraphs 19-22 below.

19. There was ample evidence of physical injury to Mother. This was observed by Officer Tafili and by Mr. and Mrs. Cottam., and is documented by the photographs received into evidence.

20. The Cottams came to the home virtually at the time the incident occurred. Mother's emotional state fully supports her versions of the facts. Both of the Cottams and Officer Tafili testified convincingly about the emotional stress that she was obviously suffering both immediately after the incident when the Cottams arrived and a couple of hours later when interviewed by the officer. The explanation of events stated by Mother are consistent with the setting.

21. Once again, there is no credible explanation offered by Father as to the cause of the undeniable physical injury and reaction by Mother. Father acknowledged that he was there, and that he and Mother had a disagreement. But he testified that Mother was injury free when he left and speculated that she caused the injuries to herself after he left. The Cottams were there before Father left, so in order to believe Father, this Court would have to find that there were no injuries when the Cottams got there (contrary to the Cottams testimony) and that they were inflicted either while the Cottams were there or after they left. Once again, this is just not credible.

22. The next morning Mother passed away by self inflicted causes.

23. In addition to these four specific and dramatic incidents of physical abuse of Mother by Father, Father was abusive to Mother at other times and his overall treatment of her was, at times, both physically and emotionally abusive. Jacob was present when some of the emotional abuse took place. There was ample evidence that Father and Mother argued frequently, including when Jacob was there or n other parts of the premises. Mother had bruises at times immediately following an argument with Father. And Father acknowledged to more than one person that he had physically harmed Mother and that

he needed to treat her better.

24. The Court adopts the testimony of others over Father on each of the incidents of abuse set forth above. There are several reasons. First, Father offers no reasonable explanation for any of the vents. Second, Father has the greatest motive to misrepresent the facts. Third, Father has been convicted of a crime involving dishonesty and thus his credibility is diminished. Fourth, the Cottams are more sincere and convincing in their demeanor and character than is Father.

25. Father is presently incarcerated. He was sentenced to federal prison on July 14, 2004 for being a felon in possession of a firearm/ammunition. He was sentenced to 57 months of incarceration, leaving approximately 46 months from the date of this decision to serve.

26. During the last several years, Father has been convicted of the following criminal offenses:

Date	Crime	Criminal #	Classification
7/9/97	III Poss. Of Cont. Subst.	00056 - Wash. Cty.	Class B Misdem
7/9/97	III Poss. Of Drug Para.	0065- Wash. Cty.	Class B Misdem
6/19/98	Poss. W/ Intent to Dist.	01468- Wash. Cty.	2nd Degree Felony
6/19/98	Assault against Peace Off.	01468- Wash. Cty.	Class A Misdem
4/10/00	Carry Concealed Weapon	00952- Wash. Cty.	Class B Misdem

4/25/00	Unlawful Tele Device	0922- Wash. Cty.	3rd Degree Felony
7/14/04	Felon Poss Firearm	00801- U.S. Dist	Federal Offense

Father has served time in jail and prison for four of these offenses.

27. Jacob has had limited contact with Father since the protective order was initially issued by this Court on or about September 3, 2003, and his incarceration soon thereafter. And, of course, Jacob is now without the care of his mother. As a result, since about September 3, 2003, Jacob's primary parental care has been given by the Cottams and the Montgomerys.

28. Father has demonstrated extremely poor judgment in relation to parenting Jacob. Father referred to Jacob as a 'bastard" several times. He picked him up by one arm, which was totally inappropriate for a child of Jacob's age at the time. The letters which Father sent to Jacob from prison were very inappropriate. Father's ignorant approach to depression also causes great concern about his ability to be an appropriate Father in the likely event that Jacob has depression-related issues. There was no evidence that any of this conduct had a direct effect on Jacob, but the Court finds them to be of great concern for the future and to be a factor in parental fitness.

29. Both the Cottams and the Montgomerys love Jacob. Each set of grandparents has a genuine desire for his well being, and each genuinely believes that their guardianship and custody of Jacob would be in his best interest.

30. The Cottams desire to be the permanent caregivers for Jacob. They would prefer adoption, but have also petitioned for permanent guardianship. The Montgomerys desire temporary guardianship and would surrender custody back to Father when he gets out of prison.

31. While both the Cottams and the Mongomerys have a love for and bond with Jacob, the stronger bond is with the Cottams. Jacob sees the Cottams, and specifically Valerie Cottam, as his primary caregiver.

32. The Cottams will be good parents to Jacob. The Court is not so sure that Father will be. And, while the Montgomerys will certainly meet the minimal standard, they will not be as good for Jacob as the Cottams will be.

33. Primarily because of Jacob's troubled environment during the years before his Mother passed away, Jacob has some special issues, which will be discussed below. Some of the emotional suffering Jacob has experienced has been the direct result of Father's conduct. Father abused Mother in Jacob's presence which caused direct emotional reaction. The parents argued and fought in Jacob's presence which also caused emotional reaction. The conduct of both parents contributed to Jacob's emotional condition.

34. As testified by Dr. Durham, Jacob suffers from some emotional struggles that make permanency and stability for him even more crucial than it would be for the average child. He is suffering from the effects of trauma, the separation from both parents, and the emotional and other turmoil in his life. The loss of both parents makes his condition fragile. He has, and will continue to have, a significant need for consistent, permanent and dependable parental care.

35. Jacob needs to maintain primary attachments. To change Jacob's primary caregiver would cause further emotional harm to Jacob. He would be required, once again, to look to a different parent as his primary source of comfort and support. It is, therefore, in his best interest to remain with Howard and Valerie Cottam. While other factors enter into the Court's decision, as will be set out more fully below, this best interest finding is the most compelling in the Court's mind.

36. Jacob does not have a significant bond with his Father.

While he may be able to identify by familiarity pictures or other items which depict Father or Father's influence, Father has been out of his life for long enough that no significant relationship remains.

37. Father's absence from the presence of the child has been primarily because of his circumstances, including his incarceration and the limitations placed by the Court. Based on previous behaviors, Father would have maintained a relationship with the child had the circumstances not precluded him from doing so. After Father's incarceration, of course, his relationship would have, of necessity, been drastically reduced because of the circumstances relating to incarceration.

38. Both the Cottams and the Montgomerys are fit parents in that neither parent is likely to abuse or neglect children, and both would adequately provide for the food, shelter and other necessities of the child. However, the parenting style of the Cottams is more conducive to child success than is that of the Montgomerys.

39. Specifically, the Montgomerys have demonstrated a less structured parenting style which deflects accountability. No parent can, of course, guarantee the good behavior of their children and often children act in ways inconsistent with the good parenting which they receive. But the reality is that some parenting styles work better than others in today's world and the opinion of the expert on this point is persuasive. Thus the Court finds that the parenting style of the Cottams is most likely to bring success in raising Jacob.

40. There was considerable proof offered by all sides about statements allegedly made by Father and the Montgomerys regarding their preference for Jacob's care, especially after it became apparent that Father may be facing jail time. The evidence was not clear and convincing one way or the other on this point and therefore the Court cannot find that Father or the Montgomerys made statements regarding a placement

preference with the Cottams. And, even were such statements made, such comments made in a time of crisis are not nearly as significant as the other factors which are found in this decision.

41. On April 26, 2004, September 28, 2004, and April 29, 2005,[1] Father signed documents entitled Delegation of Parental Powers and Power of Attorney, by which he purports to delegate his parental authority to the Montgomerys under the authority of Utah Code Ann. § 75-5-103.

Having Made its findings of fact, the Court now makes its

ANALYSIS AND CONCLUSIONS OF LAW

For continuity of discussion, there are other findings included with the Court's analysis in this section. When the designation or context indicates the Court's intention for a statement to be a factual finding, then it shall be considered a finding of fact even though not specifically included in the Findings of Fact above.

Point 1: Objections to insufficient service of process have been waived.

Although earlier in the proceedings there were some difficulties in bringing all of the required parties into the respective cases, Father, the Montgomerys, and the Cottams are parties to and bound by the Court's decision here in all of the proceedings. To the extent that there may be defects in process or service of process, those defects have been waived by the appearance of the parties and their participation in these proceedings without objection to the process. Pease v.

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[1] The April 29, 2005 document was signed and filed after the trial.

Industrial Comm'n, 694 P.2d 613 (Utah 1984) (holding the issue of insufficient process waived where a party "clearly entered an appearance . . . and failed to raise and litigate the jurisdictional issue at that time"). See also Sorensen v. Sorensen, 417 P.2d 118 (Utah 1966).

Point 2: Father physically and emotionally abused Mother.

Father physically and emotionally abused Mother during their relationship, including during the time after Jacob's birth when they lived together as a family. Specifically, Father's intentional physical and mental injury of Mother in the incidents described in Paragraphs 8, 9 14, 18, and 23 constitutes physical and mental abuse of Mother. And, as found above, there was considerable turmoil in the relationship between these parents. While Mother was also abusive to Father, Jacob was the one person in the family who could not control the turmoil and yet he suffered because of it.

Point 3: Jacob Montgomery is an abused child.

Father's abuse of Mother constitutes abuse of Jacob in two ways. First, Father committed domestic violence in the presence of the child, which undoubtedly inflicted mental harm on Jacob. Second, Father's abuse of Mother had a dramatic and apparent effect on Mother and reduced her ability to be a good parent, and therefore caused harm to Jacob. This household was one of turmoil which had a negative effect on the mental and emotional condition of Jacob. The Juvenile Court Act defines an abused child as a minor who "has suffered or been threatened with non-accidental mental harm. . ." Utah Code Ann. § 78-3a-103(1)(a)(1). On at least one occasion Jacob was present when Father physically abused Mother. Jacob's reaction at that time is telling. At the time of the "body-slam incident" described in Paragraph 9 of the Findings of Fact, Jacob was visibly upset by the event. He cried uncontrollably and reached out for his Mother. He was

present at other times of conflict between the parents. Then, Dr. Durham concluded that Jacob suffered from a post-traumatic type of disorder. There was no evidence of any other trauma in Jacob's life. The only logical conclusion on the evidence presented is that Jacob's suffering was caused by the conflict between his parents.

Similarly, the abuse of Mother at the hand of Father had a dramatic effect on Mother and her ability to be a good parent, and thus on the mental and emotional welfare of Jacob. Mother struggled with emotional issues during her entire relationship with Father. She tried to commit suicide a few weeks before her death. Father knew she had significant emotional issues which were magnified at times by substance abuse. Instead of trying to help her to find a solution he told her she wasn't taking any "crazy pills" and then physically and emotionally abused her. There is no question that the ultimate effect of this conduct hampered her ability to parent Jacob and ultimately caused Jacob to suffer mentally and emotionally.

As noted above, Dr. Durham opined that Jacob is suffering the effects of trauma experienced at some point in his young life. While the cause and effect between Father's conduct toward Mother and the effect on Jacob is not as precise as in a chemistry experiment, the Court finds that Father's treatment of Mother caused mental harm to Jacob.

While no Utah case law on this point was submitted by the parties, other appellate courts have upheld findings of abuse on similar facts. In re Deandre T. 253 A.D.2d 497 (N.Y. App. Div. 1998) (holding that "father's violent abuse of the mother in the presence of their daughter . . . resulted in impairment of the child's mental and emotional health").[2] Martin N. V.

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[2] Technically, the New York statute at issue here relates to a "neglected child" rather than an "abused child," but the relevant finding - that of mental harm - makes the New York 669 (N.Y. App. Div. 1998) ("the evidence of acts of

State, 79 P.3d 50 (Alaska 2003) (where father, "among other acts, used a gun to shoot [mother's] dishes; prevented her from leaving an argument by grabbing her at the neck, holding her up against the wall while kneeing her in the stomach, and finally pointing a gun at her, at which time she was three months pregnant; shouting at her in a bar and commanding her to get in his truck; . . . threatening to kill her cat and dog . . . and sho[oting] her once in her right buttock," the court reiterated its prior holding that "witnessing domestic violence is mentally harmful to children," held the child to be at substantial risk of mental harm, and thus adjudicated her a "child in need of aid," which is the Alaska statute's equivalent of an "abused child" in Utah).[3]

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severe violence between [parents] in the presence of their children is sufficient to show , 'as a matter of common sense', that the children were in imminent danger of becoming impaired within the meaning of [the 'neglected child' provision], and indeed that the oldest child had already suffered actual emotional harm").

[3] The commission of domestic violence in the presence of a child is criminal child abuse in Utah. U.C.A. § 76-5-109.1. Although the definition of criminal child abuse may sometimes be inapplicable in juvenile court proceedings, S.S.P. v. State (State ex rel. L.P.), 981 P.2d 848 (Utah Ct. App. 1999), it is hardly irrelevant to a juvenile court's consideration of § 78-3a-103(1)(a)(I) that an act that has been designated criminal has occurred. See Borchgrevink v. Borchgrevink, 941 P.2d 132, 140 (Alaska 1997) (stating that "the deleterious impact on children of witnessing domestic violence is widely recognized," and quoting Custody of Vaughn, 422 Mass. 590, 664 N.E.2d 434, 439 (Mass. 1996) ("It is well documented that witnessing domestic violence ... has a profound impact on children. There are significant

Based on the findings and analysis set forth above, Jacob is an abused child within the definition of section 103 of the Juvenile Court Act and Father committed the abuse within the definition of section 407.

Point 4: Jacob is a neglected child.

The Juvenile Court Act defines a "[n]eglected child" as "a minor . . . (B) whose parent ... has subjected the minor to mistreatment or abuse; [or] (C) who lacks proper parental care by reason of the fault or habits of the parent[.]" Utah Code

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reported psychological problems in children who witness domestic violence, especially during important developmental stages.") (citations omitted)). Some courts have found that physical violence by one parent against the other in the presence of a child may also endanger the child physically, even though the acts of violence are not specifically directed at the child. See lane v. Jefferson County (continued...)

3 (...continued) Child Welfare Unit, 564 S.W.2d 130, 132-33 (Tex. Civ. App. 1978) (where mother testified that father committed numerous acts of violence, including throwing a fan across the room that "almost hits] the child," and that he "threw some bricks or rocks through the window shattering glass in all directions and that the child . . . was asleep in the bedroom nearby and that everyone came very close to being cut by the flying glass, and [father] knew of the presence of the child," the court held that the "evidence shows [father] guilty of committing acts of violence in the presence of the child on several occasions, and that such acts were of a nature to endanger the physical well-being of the child") (internal quotations omitted), overruled on other grounds by In the Interest of B.B., 971 S.W.2d 160, 169 (Tex. App. Beaumont 1998); Martin N., 79 P.2d at 54 (father's "violent tendencies," described in part in text above, were held to "pose a risk of future [physical] harm to [daughter]").

Ann. § 78-3a-103(1)(s)(I).

Jacob is a neglect child under U.C.A. § 78-3a-103(1)(s)(i)(B) and (C). First, the Court has already found that Father has subjected the child to abuse, satisfying subsection (B). Second, subsection (C) is satisfied because Father is incarcerated due to his commission of a crime, which is his won fault, and is therefore unable to give Jacob "proper parental care by reason of the fault or habits of the parent." The conduct of Father comes squarely within the language of the statute and thus is neglect by definition.

The Court is aware that the Court of Appeals has stated in dicta that in certain situations incarceration alone may not be neglect or unfitness. See In re D. B., 57 P.3d 1102, 1105 n.3 (Utah App. 2002). However, the statement of the Court of Appeals in D.B. does not apply to these facts in that Jacob does not have a normal, stable home to go to without the intervention of this Court and there is considerably more than incarceration alone supporting a finding of neglect. In D.B., the Court of Appeals explained that "in reality, it is the child's deprivation of a normal home for a period of more than a year that renders the incarcerated parent unfit, not the incarceration itself." 57 P.3d at 1105. The Court was interpreting a statute that is not controlling here, but this Court finds that the same principle applies. That is, if a parent is incarcerated in a situation that prevents the child from having a normal home life, the effect of that incarceration can be neglect or unfitness. In this case, the Court finds that Father's incarceration prevents Jacob from having a normal home life. He is without his Mother, his grandparents are in constant conflict, Jacob has significant emotional issues to deal with, and he cannot simply go on as if his Father were there.

The Juvenile Court Act, in part 4 which relates to termination of parental rights, outlines specific facts which may be considered by the Court in determining if the child is neglected. U.C.A. § 78-3a-408(2) provides, in pertinent part:

> (2) In determining whether a parent or parents are **unfit or have neglected a child** the court shall consider, but is not limited to, the following circumstances, conduct, or conditions:
> (b) conduct toward a child of a physically, emotionally, or sexually cruel or abusive nature;
> (c) habitual or excessive use of intoxicating liquors, controlled substances, or dangerous drugs that render the parent unable to care for the child; . . . or
> (f) a history of violent behavior.

(emphasis added).

Each of these considerations support a finding of neglect (as well as unfitness, which will be discussed below) under the facts of this case. As set forth in the Court's Findings of Fact, Father has engaged in the conduct described in the statute. Taking the considerations one at a time, under subsection (b), the Court has already found that the conduct of Father has been of an emotionally abusive nature. The analysis behind that conclusion is set forth above and will not be repeated here.

The history of drug abuse under subsection (c)is a fact, although it is less significant than the other two factors because the last established drug use was some time ago. While Father has a history of use which satisfies the statutory language, there was no proof that he has used since Jacob was born. But, there is also no proof that he has completed substance abuse classes or taken other action to overcome the possibility of relapse.

Finally, under subsection (f), the Court finds that the multiple incidents of violence towards Mother constitute "a history of violent behavior" and finds that it is significant for the reasons set forth under Points 2 and 3 above.

Once again, findings of neglect have been sustained by courts on similar facts. State ex rel. D.A.C., 933 P.2d 993, 1001 (Utah Ct. App. 1997) (where father "ha[d] a history of

violent behavior," had "[o]n numerous occasions . . . threatened [m]other with physical harm, including threatening to kill her," had "failed to pay child support," had "been incarcerated three times," including "for felony assault against [m]other," and where the couple's three-year-old child had "witnessed this assault and [been[knocked to the ground from [m]other's arms during it," and where "the children were emotionally upset by [f]ather's abuse of [m]other," the court held that clear and convincing evidence of father's unfitness or neglect under U.C.A. § 78-3a-408(2) existed to terminate his parental rights).

Father has neglected the child within the standard defined in sections 103, 407, and 408 of the Juvenile Court Act and thus this Court has both jurisdiction under section 104 and grounds for termination under and part 4 of the Act.

Point 5: Father is unfit parent.

Cottams allege unfitness as an additional ground for termination of Father's parental rights. Section 78-3a-408(2), quoted and analyzed above under Point 4, also applies to findings of unfitness. The Father is unfit under the same analysis. In summary, Father (1) has a history of violence and particularly a history of violence against Mother in direct disregard for the effect on Jacob; (2) has a history of criminal activity that has landed him in jail and prison four separate times, including the present incarceration; (3) has abused and neglected Jacob; (4) has demonstrated a serious absence of understanding of the effects his actions and attitude as a parent have on Jacob; and (5) is incarcerated for another 46 months due to his own actions.

Courts have also upheld findings of unfitness on similar facts. The closest case factually, State ex rel. D.A.C., is referenced above, but the analysis is repeated here because it applies equally. State ex rel. D.A.C., 933 P.2d 993, 1001 (Utah Ct. App. 1997) (where father "ha[d] a history of violent

behavior," had"[o]n numerous occasions . . . threatened [M]other with physical harm, including threatening to kill her," had "failed to pay child support," had "been incarcerated three times," including "for felony assault against [m]other," and where the couple's three-ear-old child had "witnessed this assault and [been] knocked to the ground from [m]other's arms during it," and where "the children were emotionally upset by Father's abuse of [m]other," the court held that clear and convincing evidence of father's unfitness or neglect under U.C.A. § 78-3a-408(2) existed to terminate his parental rights). In determining parental fitness the Court may take a broad look at the parents' habits and history and not just at the immediate conduct that brings the parent before the Court. M.N. v. State, 2001 UT App 229 (unpublished mem. Op.). Father's history and habits, as detailed above, justify a finding of unfitness.

The incarceration of Father is particularly significant to the Court. First, it drastically limits the relationship he can have with Jacob for the next almost 4 years. Second, it effectively prohibits Father form remedying the problems which led to the finding of unfitness, which is a factor that must be considered in unfitness claims. Because he will be incarcerated for another 46 months, Father is not likely to remedy the circumstances making him unfit. There was not a psychological evaluation done on Father and thus the Court cannot find one way or the other whether Father is psychologically disposed to correct his violent streak and his criminal behavior. But his history demonstrates that change is not likely. His history of both criminal behavior and violence goes back years. Until he gets out of prison almost four years form now, he will not be able to demonstrate his behavior one way or the other. Thus, for at least the next almost four years, Father is not likely to remedy the violent behavior he has demonstrated in the past.

As noted above, the Utah Court of Appeals has stated in

dicta that incarceration is not, of itself, sufficient for a finding of unfitness or neglect in some circumstances. In re D.B, 57 P.3d 1102, 1105 n.3 (Utah App. 2002). The thrust of the D.B. opinion is that incarceration must be considered in context. If the minor can continue living with a relative without significant interruption of his "normal" life, and if there are no other elements of unfitness, then incarceration may not make a parent unfit. Here, Jacob cannot simply continue his normal life. His Mother is dead. The turmoil between grandparents has caused him considerable grief. Additionally, here there are a number of other indications of unfitness.

Point 6: Father has not abandoned Jacob.

The Cottams also claim that Father has abandoned Jacob. For the reasons set forth in Paragraph 37 of the Findings of Fact above, the Court finds that Father has not abandoned Jacob. Prior to Father's incarceration, there is very little evidence concerning his efforts to maintain his parental relationship with Jacob. After Father was incarcerated, it appears that he supported Jacob at some level and maintained some contact with him. He has not seen him since he went to jail, but that is in part because of the orders of this Court that Jacob not visit him in prison.

The applicable case law holds that termination of parental rights for abandonment cannot be based on incarceration alone. State ex rel. M.L. v. State, 965 P.2d 551, 558 (Utah Ct. App. 1198) (citing State ex rel. M.W.H. v. Aguilar, 794 P.2d 27, 29 (Utah Ct. App. 1990) for the proposition that "incarceration could be considered along with other evidence to support finding of abandonment") (internal quotations omitted and emphasis added). On the other side, incarceration is not an excuse for not maintaining the parent/child relationship to the extent that the incarceration allows. In re M.C., 940 P.2d 1229 (Utah App. 1997). While incarcerated

Father supported or attempted to support Jacob. He sent letters to him (however inappropriate) and stayed actively interested in his progress in conversations with the Montgomerys. There is no evidence that he could have done anything else to maintain the relationship while in prison. See In re M.C. Except for the incarceration, there is no indication that Father would not have continued contact with the child sufficient to maintain some acceptable level of parent-child relationship. On these facts, Father did not abandon Jacob.

Point 7: The findings of abuse and neglect trigger jurisdiction under Utah Code Ann. § 78-3a-104 and grounds for termination under § 78-3a-407.

Because of the abuse and neglect found above, this Court has both jurisdiction to grant a guardianship under § 78-3a-104(1)(c), (e) and 118(o) and grounds to terminate parental rights under § 78-3a-407 pending a finding of best interest, which will be set forth below. Similarly, the Court's finding of unfitness also invokes jurisdiction under § 78-3a-407, pending a best interest finding. Finally, on the facts found by the Court, there are two other grounds for termination which have been plead by the Cottams and have been proven. The child is in and out of home placement under the supervision of the Court and Father has been unable or unwilling to remedy the circumstances that caused the removal under § 78-3a-407(1)(d). Only token efforts have been made by the Father to eliminate the risk of unfitness and abuse under § 78-3a-407(1)(f).

Point 8: The findings of abuse, neglect and unfitness trump the parental delegation by Father.

Father claims that this Court is duty bound to follow his designation of the Montgomerys as the guardians for Jacob in the Designation of Parental Powers referenced above. The Court finds to the contrary. Once jurisdiction is established,

this Court has all of the rights and options granted under Utah Code Ann. § 78-3a-118. If the parental designation is consistent with the best interest of the child, and the other applicable provisions of the Juvenile Court Act, then it should be followed. However, if the parental designation is not in the best interest of the child then there is no provision of law which allows the Court to ignore the entire body of child welfare law in favor of such a designation.[4]

Point 9: Child's best interest.

The controlling determination, once jurisdiction is established, is the best interest of the child. Utah Code Ann. § 78-3a-406(3) states: "If a parent is found by reason of his conduct or condition, to be unfit or incompetent under any of the grounds for termination described in this part, the Court shall then consider the welfare and best interest of the child of paramount importance in determining whether termination of parental rights shall be ordered." In this case, then, the beast interest of Jacob Montgomery controls this Court's final disposition order.

The options are three: (1) guardianship with the Cottams; (2) guardianship with the Montgomerys; or (3) termination of parental rights and adoption by the Cottams. These three choices narrow very quickly to two when the child's best interest standard is applied. The Court finds that it is not in Jacob's best interest to be placed with the Montgomerys as temporary guardians. The most important considerations in

---

[4] See In re Martin, 602 N.W.2d 630 (Mich. Ct. App. 1999) (holding probate court had jurisdiction over guardianship proceeding despite incarcerated (continued...)
4 (...continued)father's execution of power of attorney delegating his parental rights to another); In re Webster, 427 N.W.2d 596 (Mich. Ct. App. 1988).

reaching this conclusion are set forth in findings 30 through 35 of the Court's Findings of Fact above. Another disruption in Jacob's placement would be detrimental to him. He is established in a stable home and there is no reason to move him to the Montgomerys. To do so would certainly not be in his best interest.

The decision between the remaining two options is more difficult. Indeed, this decision, and decisions like it, are the most difficult a juvenile court has to make. Factors weighing in favor of termination of parental rights and adoption are:

(1) The age of the child. Jacob is three years old. At this time it is within the Court's ability to give Jacob a permanent home, with a mom and dad, without the uncertainty inherent in guardianship placement.

(2) Lack of finality of guardianship. If the Court's decision is guardianship, it would be possible, indeed expected, that Father would reenter the child's life at some point. It will be at least four years from now, when he gets out of prison, and who knows how soon after that. Thus, at approximately age seven or eight, Jacob's placement would potentially be disrupted again. At that time he would be required to get used to a new set of surroundings and a new set of influences by Father and the Montgomerys. And, even if Father re-enters the picture, his lifestyle will almost certainly not be as stable as will be that of the Cottams.

(3) Parenting abilities. The Court finds and believes that the Cottams will be good parents to Jacob. The Court is not so sure that Father will be. And, while the Montgomerys will certainly meet the minimal standard, they will not be as good for Jacob as the Cottams will be.

(4) Length of incarceration. If Father were just going to be locked up for a short period of time that would be one thing, but he will be in jail for a long time to come. By the time he is out and in a position to receive Jacob back into his care, almost half of Jacob's juvenile life will be over. The

more stable and secure Jacob becomes with the Cottams, the harder on Jacob it will be to return to Father. Thus, the lengthy delay between today and the time Father might possibly resume any reasonable parent/child relationship is a significant factor.

(5) Emotional stability of Jacob. Dr. Durham testified, and common sense dictates, that Jacob will be emotionally better off having the stability of an immediate decision. If he is required at a later point to weave his way through the complex series of adjustments that will be required when Father gets out of prison, there will be significant emotional challenges for the child. Perhaps he will handle it, and perhaps it will create chaos from which he will not recover. In the Court's mind, there is no question that there will be an effect, and that such effect will be negative. The only question is how bad it will be.

(6) Conflict between the families. There is considerable conflict between the Cottams on the one side and the Montgomerys and Father on the other. As with most spats of this nature, regardless of age level, it is impossible to determine where and in what precise degree the fault lies. Each side is responsible in part, and if each would worry more about how they could do better instead of how the other side could do better there would certainly be a lot less chaos in Jacob's life. Dr. Durham testified that the conflict between the families will continue to be a cause of turmoil in Jacob's life. History supports Dr. Durham's opinion. It has been going on for almost 2 years now and there is no reason to think it will end anytime soon. Everyone hopes that the end of this legal battle will make healing easier, but time will tell. If a guardianship were created, that would leave the door open to almost indefinite wrangling about the rights of the parties and the best interest of Jacob.

(7) Failure of Father to acknowledge his violent conduct toward Mother. The Court is very confident in its findings

that Father abused Mother as set forth above. It is troubling that Father will not acknowledge his conduct and commit to improve himself and do better. It's hard to rehabilitate if you don't admit what you did.

(8) Section 409 findings. Section 409 of the Juvenile Court Act requires certain findings when the child is out of the parents' home. The Court finds that the physical, mental and emotional needs of Jacob require permanent and stable placement, which can best be met with adoption. Father has made limited, if any, efforts to change his behavior to correct deficiencies.

The following factors weigh in favor of guardianship:

(1) Reunification is possible eventually. Despite the seriousness of the abuse by Father, this is the kind of conduct that this Court routinely grants reunification services to correct. While Father will certainly not be in a position to receive the child back in his care within normal reunification time limits, he may well be eventually. Despite Father's history, as noted above, it is certainly possible that with services Father could learn the lessons necessary to bring his conduct within the bounds of proper parenting. The Utah Supreme Court (under a predecessor to the Juvenile Court Act) has held that the degree of departure from the norm is a factor that should be considered by the trial court in determining whether parental rights should be terminated. In re Winger, 558 P.2d 1311 (Utah 1976). While Father's conduct is certainly not justifiable, it is not sufficiently beyond the norm that it couldn't be remedied given enough time.

(2) Family support. If, and it's a big "if", these families could get along, there would certainly be plenty of support for Jacob's success. He would have lots of positive relationships and his stability could be reinforced at several levels.

(3) Relationship with the Montgomerys. Dr. Durham stated in the recommendations portion of her Child Custody Evaluation: "I do believe it would be helpful for Jacob to

maintain contact with the Montgomerys possibly one to two days per month. . . ." All other things being equal, a relationship with grandparents is a good thing and the Montgomerys would be good for Jacob in the normal way that grandparents are good for grandkids. However, because of the unique situation we are now in, the Court questions whether the Montgomerys could maintain an appropriate grandparent relationship after Father is released from prison.

(4) Parental presumption. Both case law and the Juvenile Court Act presume that parenting by the natural parents is preferable to surrogate care.

Weighing the factors on each side of the equation is difficult. There is no formula which can be easily applied. Courts have upheld either termination or guardianship on similar facts.

After careful consideration of all factors, the Court's bottom line is this. There is no question, by any standard, without regard to the parental presumption, that the best thing for Jacob is to be adopted by the Cottams. It eliminates most of the significant concerns about permanency and stability, further disruption, conflicts between the parties, risk of further abuse or neglect, and finality. In addition, the Court finds that the Cottams will be good parents to Jacob and is not so sure that Father will be. But still, the Court is mindful of the significant impact of such a decision on all of the parties and thus approaches such a decision with caution and reluctance. The Juvenile Court Act mandates that in all child welfare proceedings where termination of parental rights is an issue the Court "shall give full and careful consideration to all of the evidence presented with regard to the constitutional rights and claims of the parent. . ." Utah Code Ann. § 78-3a-406(3).

In addition, apart from the incarceration, the actions of Father are not the type for which parental rights are typically terminated. The Court realizes that this may be hard for the Cottams to swallow in view of what happened to their

daughter. But the reality is that even in situations of domestic abuse, in the vast majority of cases the abusing parent is allowed to correct his/her faults and resume their parental role. In short, this is a very close case.

The resolution is found in the format of the Juvenile Court Act. As noted above, part 4 of the Act provides a two step process for making this determination. First, the Court is to determine if one of the qualifying grounds for termination has been met. The Court has analyzed and re-analyzed the proof on this issue as objectively as the Court knows how and has found that Jacob is abused and neglected and that Father is an unfit parent. Once the Court finds one of these grounds for termination, then the best interest of the child controls. Utah Code Ann. § 78-3a-406(3). For the reasons stated above, the Court finds that termination of parental rights and adoption is convincingly in Jacob's best interest. So, balancing all of the factors discussed above, and being true to the mandate of the statute, that is the Court's finding and order.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the parental rights of Robert Montgomery, Jr., in and to Jacob Montgomery are hereby terminated. Temporary guardianship of Jacob Montgomery is granted to Howard and Valerie Cottam, pending the filing of a petition for adoption by the Cottams. Visitation with the Montgomerys is to continue until further order, two days per month, daytime only, with third party exchange as it has been done in the past. All parties are enjoined from discussing this case, the other parties, or any future actions with or in the presence of Jacob.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Montgomerys' Verified Petition for Guardianship is denied.

This order does not address every claim made or issue

raised by the parties. If any party would like further findings or clarification on any aspect of this order they shall file their request for additional findings on or before July 6, 2005. The parties are reminded that any proffers which they would like to submit in support of their record in the event of appeal are to be submitted in writing before July 6, 2005. The parties are also referred to the document regarding appeal rights which is sent with this Order.

Dated this 23rd day of June, 2005

s/ Thomas M. Higbee
Thomas M. Higbee
Juvenile Court Judge

FILE
UTAH APPELLATE COURTS
MAY 25 2006

D. Bruce Oliver
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IN THE UTAH COURT OF APPEALS

IN THE INTEREST OF	
	PETITION ON APPEAL
J.M. DOB: 02/08/2002	
Children under 18 years of age,	Court of Appeals No. 20050603-CA
ROBERT MONTGOMERY, Jr.	Juvenile Court No. 434169
Respondent/Appellant.	

Appellant Robert Montgomery, through counsel, D. Bruce Oliver, submits this Petition on Appeal from a final order of the Fifth District Juvenile Court in a child welfare proceeding pursuant to Utah Rule of Appellate Procedure 55.

1. **PARTIES and COUNSEL:** The names of the parties involved in this appeal, and the names, addresses and telephone numbers of their respective attorneys, are as follows:

Appellant: Robert W. Montgomery, Jr., father

Appellant's Counsel: D. Bruce Oliver

Cross Appellants: Lori Montgomery, Robert W. Montgomery, Sr., paternal grandparents

Cross Appellant's Counsel: LaMar J. Winward

Appellees: Valorie Cottam, Howard Cottam, maternal grandparents

Appellee's Counsel: Michael R. Shaw

Children and Dates of Birth: J.M., 02/08/2002

Guardian ad Litem: Martha Pierce

2. **ORDER SOUGHT TO BE REVIEWED:** This appeal is from an order entered on June 23, 2005, a copy of which is attached. This order:

Adjudicated the children as abused, neglected, and/or dependent;

X Terminated Appellant's parental rights to the child J.M.; OR

Dismissed a petition to terminate Appellant's parental rights to the children _____; OR

Other _____

3. **RELIEF APPELLANT SEEKS ON APPEAL** (Reversal, remand, other): Reversal of the termination because the finding was not based upon clear and convincing evidence.

4. **POST-JUDGMENT MOTIONS:** The following post-judgment motions have been filed in the trial court in this matter: N/A

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5. **RELATED APPEALS:** Describe any related appeals

involving the children (provide name of case, appellate case number, order being appealed from (i.e. appeal from adjudication, disposition), or orders previously appealed): N/A

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6. **RELEVANT DATES:** The following dates are relevant to this appeal: a) Date of removal(s): N/A

b) Date of adjudication(s): N/A

c) Date of disposition(s): N/A

d) Date of permanency hearing(s): N/A

e) Date of order(s) terminating Appellant's parental rights or dismissing petitions to terminate Appellant's parental rights: **June 23, 2005**

f) Date notice of appeal filed: **July 6, 2005, amended on July 14, 2004**

g) Any other dates relevant to this appeal: N/A

7. **STATE THE MATERIAL FACTS AS THEY RELATE TO THE ISSUES PRESENTED FOR APPEAL** (attach separate sheet if necessary):

Note: The fact statement should be concise and should focus on those facts necessary to a proper understanding of the procedural history of the case and those facts relevant to the issues Appellant wishes to raise on appeal.

On September 3, 2003, Appellant's wife committed suicide. Appellant was deprived of custody of his minor child as a result of an ex parte protective order which was filed by his deceased wife's parents, the Cottams. No allegations were made which would allow a transfer of custody. Appellant was arrested as he arrived to participate in the hearing for the protective order. Appellant at no time consented to custody of his minor child being with his in-laws. The ex parte protective order was continued without date, however, the ex parte

protective order was later dismissed. During the interim appellant designated his own parents as the custodians of his minor child. This designation was never challenged by the Cottams. Appellant at all times attempted to maintain custody or control of his own minor child. In anticipation for a possible period of incarceration appellant had designated his own parents to temporarily care for his own minor child, and delegated parental powers and power of attorney them on April 29, 2005.

At trial, the Cottams put on evidence of alleged domestic violence incidents between Appellant and his wife. Judge Higbee, the juvenile court judge, in his ruling relied on very few incidents to termination appellant's parental rights. None of the incidents relied upon by the judgment in his written decision, attached, demonstrate that Appellant is an unfit parent. Appellant's parent rights to his minor child should not have been terminated for isolated irrelevant behavior to his wife.

8. STATE THE LEGAL ISSUES PRESENTED FOR APPEAL, INCLUDING A STATEMENT AS TO HOW THE ISSUES AROSE AND HOW THEY WERE PRESERVED FOR APPEAL:

Note: The issue statement should be concise in nature setting forth specific legal questions. General conclusions, such as "the trial court erred" or "The trial court's decision is not supported by the law or the facts" is insufficient. Include legal authority that both support's Appellant's case and authority contrary to Appellant's case, if known:

a) Issue 1
Involves (circle all that apply) personal jurisdiction; subject matter jurisdiction: (sufficiency of evidence);

(weight of evidence); credibility of witness; interpretation of evidence; (admissibility of evidence); adequacy of findings; application of law; interpretation of law; other _____

State Issue: Whether the admission of hearsay statements was a basis evidence to support clear and convincing evidence requirement to terminate parental rights?

Describe at what point error occurred: Throughout the entire trial

This issue x was __ was not preserved. If issue was preserved state how: Counsels' objections on the record

State legal authority for issue: Utah Rules of Evidence, rule 803 and 804, *State in re: J.C. v. Cruz*, 808 P.2d 1131 (Utah Ct. App. 1991), *Santosky v. Kramer*, 455 U.S. 745., 769, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

b) Issue 2

Involves (circle all that apply) personal jurisdiction; subject matter jurisdiction; sufficiency of evidence; weight of evidence; credibility of witness; (interpretation of evidence); (admissibility of evidence); (adequacy of findings); (application of law); (interpretation of law); other _____.

State Issue: Whether the Court's conclusions were clearly erroneous in light of the clear and convincing evidence requirement

Describe at what point error occurred: In the court's June 23. 2005 ruling

This issue X was _____ was not preserved. If issue was preserved state how: In oral arguments, the standard of clear and convincing was not applied

State legal authority for issue: *State in re: J.C. v. Cruz*, 808 P.2d 1131 (Utah Ct. App. 1991), *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)

c) Additional Issues (attach separate sheet)

9. ATTACHMENTS: The following necessary attachments are included with this petition (all of the following must be submitted):

a) a copy of the order, judgement or decree on appeal
b) a copy of the notices of appeal
c) a copy of notice of delegation of parental powers and power of attorney

Appellant requests that the appellate court grant Appellant the relief requested, or, in the alternative, set this matter for full briefing.

DATED this the 21st day of July, 2005.

s/ D. Bruce Oliver
D. BRUCE OLIVER
Attorney for appellant Robert Montgomery, Father

CERTIFICATE OF SERVICE

I certify that I caused to be mailed by first-class postage repaid, a true and correct copy of the foregoing Petition On Appeal From Juvenile Court Child Welfare Proceeding on July 21, 2005, to the following:

LaMar Winward
Attorney at Law
150 North 200 East, suite 204
St. George, Utah 84770

Michael Shaw
JONES, WALDO, HOLBROOK & McDONOUGH
301 North 200 East, Suite 3-A
St. George, Utah 84770

Marsha Pierce
OFFICE OF GUARDIAN AD LITEM
450 South State Street, Suite 200
Salt Lake City, Utah 84114

s/ D. Bruce Oliver

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FILE
UTAH APPELLATE COURTS
MAY 25 2006

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IN THE UTAH COURT OF APPEALS

State of Utah, in the interest of J.M., a person under eighteen years of age.	)	APPELLANT RWM'S MOTION TO DECLARE UTAH R. APP. P. 55 UNCONSTITUTIONAL
R.W.M., Appellant.	)	Case no. 20050603-CA
v.	)	
V.C. Appellee.	)	

Appellant, R. W. M., hereby moves for the finding of unconstitutionality of Utah R. App. P. 55 for inviting error in that it fails to adequately protect the rights of parties' parental interests for the sake of expediency. Because the risk or error is so great the rule cannot preserve fundamental fairness. See Santosky v. Kramer, 455 U.S. 475, 756-757, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). It is well0settled that the appellant is not permitted to dump the legal analysis onto this Court in briefing matters on appeal, with adequate citations to the

record. State v. Garner, 2002 UT App 234, 1 8, 52 P.3d 467. Rule 24 requires that a brief provide an argument section. *See* Utah R.App. P. 24(a)(9).

Normal briefing requires an appellant to provide adequate argument to the Court to understanding the factual and legal issues present on appeal. The Utah Courts have long held:

> The argument shall contain the contentions and reasons of the appellant with respect to the issues presented . . . with citations to the authorities, statutes, and parts of the record relied on. Briefs must contain reasoned analysis based upon relevant legal authority. An issue is inadequately briefed when the overall analysis of the issue *is* so lacking as to shift the burden of research and argument to the reviewing court.

State v. Sloan, 72 P.3d 138 (Utah Ct. App. 2003). The Appellant contends that Rule 55 while attempting to afford the parties expedience causes the parties to lose due process. In other words, the Appellant claims that as his experience herein the method Rule 55 provided him has resulted in the Court misapprehending valuable fact and law that would otherwise have been adequately present tot he Court if normal briefing requirement proscribed in Utah R. App. P. 24 were followed. This matter deals with the precious matter of custody to which no citation is required in Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed 2d 599 (1982) and yet matters of less importance such as money is still afforded standard, more thorough briefing.

RESPECTFULLY SUBMITTED this 4th day of May, 2006.

s/ D. Bruce Oliver
D. BRUCE OLIVER Attorney
for Appellant R. M.

CERTIFICATE OF MAILING

I, D. Bruce Oliver, hereby certify that on this 4th day of May, 2006, I served a copy of the foregoing **MOTION TO DECLARE RULE UNCONSTITUTIONAL** upon the counsel for the Appellee and other parties in this matter, by mailing it to:

Michael R. Shaw
JONES, WALDO, HOLBROOK & McDONOUGH
301 North 200 East, Suite 3-A
St. George, UT 84770

LaMar J. Winward
150 North 200 East, Suite 204
St. George, Utah 84770

Martha Pierce
Guardian ad Litem
450 South State Street, Suite 200
Salt Lake City, Utah 84114

Dated: 5/4/06 s/ D. Bruce Oliver

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APP 51

20050603-CA

UTAH COURT OF APPEALS

STATE OF UTAH, IN THE INTEREST OF
J.M., A person under 18 years of age.

R.W.M.,

Appellant.

v.

V.C.,

Appellee.

PETITION FOR REHEARING

Appeal from the Final Order and Judgment of the Fifth District Juvenile Court, Washington County, State of Utah, by the Honorable Thomas M. Higbee

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McDONOUGH
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St. George, Utah 84770

Attorneys for Appellee VC

D. BRUCE OLIVER
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IN THE UTAH COURT OF APPEALS

State of Utah, in the interest of J.M., a person under eighteen years of age.	)	APPELLANT RWM'S MOTION TO DECLARE UTAH R. APP. P. 55 UNCONSTITUTIONAL
R.W.M., Appellant.	)	Case no. 20050603-CA
v.	)	
V.C. Appellee.	)	

GROUNDS

Pursuant to Rule 35(a), *Utah Rules of Appellate Procedure,* R. M, the Father petitions for a rehearing because this Court has overlooked or misapprehended points of law and facts related to this case. With all due respects, apparently due to the format of the Petition on Appeal pursuant to Rule 55, the Court missed the points of law and fact *of* Appellant R. M.'s issues. Contemporaneously, Appellant also moves for the finding of unconstitutionality of Utah R. App. P. 55 for inviting error in that it fails to adequately protect the rights of parties' parental interests for the sake of expediency. Because

the risk of error is so great the rule cannot preserve fundamental fairness. See Santosky v. Kramer, 455 U.S. 745, 756-757, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). It is well-settled that the appellant is not permitted to dump the legal analysis onto this Court in briefing matters on appeal, with adequate citations to the record. State v. Garner, 2002 UT App 234, ¶ 8, 52 P.3d 467. Rule 24 requires that a brief provide an argument section. *See* Utah R. App. P. 24(a)(9).[1]

RESTATEMENT OF ISSUES

Issue 1: Whether the admission of hearsay statements was a basis to support clear and convincing evidence requirement to terminate parental rights?

Issue 2: Whether the Court's conclusions were clearly erroneous in light of the clear and convincing evidence requirement?

STANDARDS OF REVIEW

In this matter, the Appellant, R. M., raises, rather has raised in his appeal issues concerning the appropriateness of juvenile court's application of the correct burden of proof and the weight given to hearsay evidence of instances preceding his

---

[1] "The argument shall contain the contentions and reasons of the appellant with respect to the issues presented . . . with citations to the authorities, statutes, and parts of the record relied on. Briefs must contain reasoned analysis based upon relevant legal authority. An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court" State v. Sloan, 72 P.3d 138 (Utah Ct. App. 2003).

wife's death as it allegedly pertains to his and his son's constitutional rights to a father-son relationship. The contention is that relying on hearsay testimony concerning isolated incidents failed to meet the clear and convincing standard required in parental right deprivation cases. Society commands that an elevated clear and convincing standard be applied and that clear and convincing evidence of conduct exceeding more than "'a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior' be admitted. 'Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate' terminations will be ordered." Santosky v. Kramer, 455 U.S. 745, 764-765, 102 S. Ct. 1388, 71 L. Ed 2d 599 (1982).

In Utah, this Court must consider R. M.'s issues using the following standards for review:

> Whether the juvenile court applied the wrong standard of proof involves statutory interpretation and is thus a question of law reviewed for correctness. See *Hansen v. Hansen*, 958 P.2d 931, 933 (Utah Ct. App. 1998).
>
> Father next argues that the juvenile court violated his Due Process rights under the Fourteenth Amendment when it denied his request for court-appointed counsel and when he did not receive notification of hearings concerning Child. "Constitutional issues, including questions regarding due process, are questions of law that we review for correctness." *Chen v. Stewart*, 2004 UT 82, ¶ 25, 100 P. 3d 1177.

State ex rel. S.H., 119 P. 3d 309 (Utah Ct: App. 2005):

STATEMENT OF THE CASE

In this matter, the juvenile court was asked by R. M.'s parents-in-law to terminate R. M.'s parental rights and also to consider their adoption of J. M., their deceased daughter's child. Findings and order, at page 28. (Add. 28). The juvenile court had this to say about the decision it was faced:

> In addition, apart from the incarceration, the actions of Father are not the type for which parental rights are typically terminated. The Court realizes that this may be hard for the Cottams to swallow in view of what happened to their daughter. But the reality is that even in situations of domestic abuse, in the vast majority of cases the abusing parent is allowed to correct his/her faults and resume their parental role. In short, this is a very close case.

Labeling this matter as "a very close case" is admitting a preponderance of evidence characterization. Further not once in the written decision does the trial court judge indicate that he realizes the burden of proof is clear and convincing. The facts it refers to as a close case was found by this Court four incidents presented as hearsay testimony This Court isolated those incidents as follows:

> In one of these incidents, witnesses described Father as "body slamming' the deceased onto a concrete sidewalk. In another incident, a witness observed Father dragging the deceased back into the home against her will. Another incident involved Father throwing an object at the deceased that led to hospital care. And the final incident resulted in the filing of a police report on the night before the deceased's death.

These alleged incidents were directed at the mother of J. M. And not direct abuse allegations against J. M. These alleged acts of domestic violence are alleged to cause the deceased, R. M.'s wife, to taker her own life by suicide. Findings and Order, at 7. (Add. 7).

ARGUMENT

THE DECISION OF THE JUVENILE COURT IS CLEARLY UNCONSTITUTIONAL - FOR FAILING TO APPROACH THE TERMINATION ISSUE AS DIRECTED BY THE SUPREME COURT IN SANTOSKY V. KRAMER.[2]

A. Burden of Proof – "A Very Close Case" is not Clear and Convincing Case of Termination.

Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed 2d 599 (1982) controls in this matter requiring this Court to reconsider its April 20, 2006 decision and requiring this Court to vacate and remand the matter to the juvenile court for restoration of the parental rights of the Father, R. M. The supreme Court in Santosky, stated:

> An elevated standard of proof in a parental rights termination proceeding would alleviate "the possible risk that a factfinder might decide to [deprive] and

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[2] Adequately briefing pursuant to Utah R. App. P. 24 would have avoided this Petition for Rehearing. Other appeals permit the filing of a Docketing Statement instead of a Rule 55 petition and appellants are not bound to the issues and case law cited in the Docketing Statement when they file a Brief. In short, the relaxed briefing permitted under Rule 55 is unconstitutional.

> individual based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior." *Addington v. Texas,* 441 U.S., at 427, 99 S.Ct., at 1810. "Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate" terminations will be ordered, *Ibid.*

Id., at 764-765. "Given the weight of the private interests at stake, the social cost of even occasional error is sizable. Raising the standard of proof would have both practical and symbolic consequences." Id., at 764. "Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures." Id., at 760-761. The question is so important to society that the Santosky Court reiterated:

> *Lassiter* declared it "plain beyond the need for multiple citation" that a natural parent's" desire for and right to 'the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right. 452 U.S., at 27, 1010 S. Ct., at 2160, *quoting Stanley v. Illinois,* 405 U.S., at 651, 92 S. Ct., at 1212.

Id., at 758-759. "In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight." Id., at 758. In this matter, even the suggestion that this matter was a "very close case" is clear indication that the Court did not possess clear and convincing belief. Had the case been clear and convincing that termination was appropriate the case would be neither close nor prematurely compared to the interests of others as was

done in this case. If it was not enough the Court called the case "very close" the Court also summarized the case to fall one of two ways:

> The options are three: (1) guardianship with the Cottams; (2) guardianship with the Montgomerys; or (3) termination of parental rights and adoption by the Cottams. These three choices narrow very quickly to two when the child's best interest standard is applied. The Court finds that it is not in [J. M.'s] best interest to be placed with the Montgomerys as temporary guardians. The most important considerations in reaching this conclusion are set forth in findings 30 through 35 of the Court's Findings of Fact above. Another disruption in [J. M.'s] placement would be detrimental to him. He is established in a stable home and there is no reason to move him to the Montgomerys. To do so would certainly not be in his best interest.
>
> The decision between the remaining two options is more difficult. Indeed, this decision and decisions like it, are the most difficult a juvenile court has to make.

Findings and order, at pages 23-24. (Add. 23-24).

B. Comparing child's best interests between R. M.'s and J. M.'s foster parents, the Cottams suggesting J. M.'s interests to be adverse to R. M.'s prior to termination was constitutionally impermissible.

As stated above, the juvenile court made a comparison of J. M.'s best interests competing the interests between the Cottams' and R. M., the natural father. The Court stated:

> The options are three: (1) guardianship with the

> Cottams; (2) guardianship with the Montgomerys; or (3) termination of parental rights and adoption by the Cottams. These three choices narrow very quickly to two when the child's best interest standard is applied. The Court finds that it is not in [J. M.'s] best interest to be placed with the Montgomerys as temporary guardians. The most important considerations in reaching this conclusion are set forth in findings 30 through 35 of the Court's Findings of Fact above. Another disruption in [J. M.'s] placement would be detrimental to him. He is established in a stable home and there is no reason to move him to the Montgomerys. To do so would certainly not be in his best interest.
>
> The decision between the remaining two options is more difficult. Indeed, this decision and decisions like it, are the most difficult a juvenile court has to make.

Findings and Order, at pages 23-24. (Add. 23-24). This approach is clearly in violation of both J. M.'s and R. M.'s Constitutional rights recognized under the Fourteenth Amendment where as the Supreme Court states needs no citation. "*Lassiter* declared it 'plain beyond the need for multiple citation' that a natural parent's 'desire for and right to "the companionship, care, custody, and management of hs or her children"' is an interest far more precious than any property right. 452 U.S., at 27, 101 S. Ct., at 2160, *quoting Stanley v. Illinois*, 405 U.S., at 651, 92 S. Ct., at 1212." Id., at 758-759. Santosky then forbade the approach the juvenile court took in this matter stating:

> The factfinding does not purport-and is not intended-to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents

or the foster parents would provide the better home.

Id., at 759. Here in this matter, the juvenile court did just that, as clearly described in the Finding and order at pages 23-24. (Add. 23-24). Such a balancing of interests is adverse to the child's presumptive rights. "Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures." Id., at 761.

> For a child, the consequences of termination of his natural parents' rights may well be far-reaching. In Colorado, for example, it has been noted: "The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period . . ., but forever." *In re* KS., 33 Colo.App. 72, 76, 515 P.2d 130, 133 (1973).
>
> Some losses cannot be measured. In this case, for example, Jed Santosky was removed form his natural parents' custody when he was only three days old; the judge's finding of permanent neglect effectively foreclosed the possibility that Jed would ever know his natural parents.

Id., at 761. "However substantial the foster parents' interests may be, cf. *Smith v. Organization of Foster Families*, 431 U.S., at 845-847, 97 S. Ct., at 2110-2111, they are not implicated directly in the factfinding stage of a state-initiated permanent neglect proceeding against the natural parents." Id. at 761. In other words, the appropriate time for the courts to consider the child best interest concerning the foster parent's, such as the Cottams here, is only after the juvenile court has consider the termination question exclusively, first. After

finding that the termination is in the child's best interest upon clear and convincing evidence, then the courts are free to consider other options. That is not what happened in this matter. Instead, as clearly preponderated by the juvenile court record, the court made a comparative review of option one, continued custody and adoption by the deceased's parents, J. M.'s maternal grandparents,[3] or whether to permit R. M. To "correct his [] faults and resume [his] parental role. Findings and Order, at pages 23-24, 28. (Add. 23, 24, and 28).

CONCLUSION

The Appellant, R. M., a Father who the juvenile court terminated his parental rights relying on a few isolated instances wherein he allegedly committed domestic violence against his wife, who later committed suicide, (not the child at issue) had his rights terminated through a comparative interest approach and by relying on hearsay testimony. The Appellant contends the juvenile court did not possess clear and convincing evidence that termination alone was in the child's best interest. The juvenile court decided termination was best because the Cottam's, the deceased's-parents (J.M.'s grandparents) adoption was better for the child. The approach is contrary to the parent-child relationship where no citation is needed. The calling of this case "a very close case" is clear indication that the evidence was not clear and convincing. In summation, the record clearly preponderates a need to set aside the court's Finding and Order. The decision to terminate must be considered exclusively and not in light of competing

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[3] Who are alleged to at least be partially responsible for the deceased's preexisting mental health problems.

best interest claims of foster parents.[4]

RESPECTFULLY SUBMITTED this 4th day of May, 2006.

s/ D. Bruce Oliver
D. BRUCE OLIVER
Attorney for Appellant R. M.

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[4] How is it in any child's best interest to call a "mother" of a child his "sister?" Since the mother is deceased, the relationship sounds morbid to call the grandparents "parents."

IN THE SUPREME COURT OF UTAH
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FILE
UTAH APPELLATE COURTS
SEP 11 2006

In the interest of J.M.
A person under eighteen years of age.

R.W.M.,
Appellant.

Case no. 20060580-SC
20050603-CA

v.

H.C. and V.C.
Appellee.

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ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on June 23, 2006.

IT IS HEREBY ORDERED pursuant to Rule 45 of the Utah Rules of Appellate Procedure the Petition for Writ of Certiorari is denied.

For the Court:

Dated September 6, 2006

s/Christine M. Durham
Christine M. Durham
Chief Justice

IN THE SUPREME COURT OF UTAH
-oo0oo-

In the interest of J.M.
A person under eighteen years of age.

R.W.M., Sr. And L.M.,
Appellant,

Case no. 20060628-SC
20050603-CA

v.

H.C. and V.C.
Appellee.

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ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on July 10, 2006.

IT IS HEREBY ORDERED pursuant to Rule 45 of the Utah Rules of Appellate Procedure the Petition for Write of Certiorari is denied.

For the Court:

Dated September 26, 2006

s/Christine M. Durham
Christine M. Durham
Chief Justice